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IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-438

IN THE MATTER
of
SAMUEL FIELDS (admitted as SAMUEL FELDSTEIN),
An Attorney.

SAMUEL FIELDS,

Petitioner,

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The Appellate Division of the Supreme Court of the State of New York for the First Judicial Department confirmed the Referee's Report and ordered your petitioner disbarred. The opinion of the court is reported at 36 A. D. 2d 277, 319 N. Y. S. 2d 993 (1st Dep't 1971), and a copy of the Court's opinion is appended hereto as Appendix A. The order of the Court is appended hereto as Appendix B.

Motions to the said Appellate Division by your petitioner for reargument, leave to appeal, and temporary stays pending such proceedings were denied in all respects without opinion. A copy of that order, as yet unreported, is appended hereto as Appendix C.

The Court of Appeals for the State of New York granted motion to dismiss your petitioner's appeal taken as of right and denied your petitioner's cross-motions for leave to appeal and for temporary stays pending the determination of said appeals and, in the alternative, pending petition for a writ of certiorari in this Court without opinion. Copies of those orders, as yet unreported, are appended hereto as Appendices D-1 and D-2.

Jurisdiction.

The jurisdiction of this court to review by writ of certiorari is invoked under the provisions of Title 28, United States Code, Section 1257(3). The disbarment of your petitioner without due process of law and in denial of equal protection of the laws violates his rights and privileges claimed under the Constitution. Petitioner seeks review of the aforesaid orders of the Court of Appeals for the State of New York dated and entered July 7, 1971. No motion for rehearing of said motions has been made. No extension of time within which to petition for certiorari has been sought.

Questions Presented.

May a disbarment, in a disciplinary proceeding where both crimes and other misconducts are charged, be predicated upon no more than a fair preponderance of the evidence?

May that disbarment be predicated upon a rejection of rebuttal evidence rather than a finding of the sustaining evidence?

May that disbarment be imposed upon the application of a standardless statute when that discipline is extraordinarily severe and discriminatory when compared to adjudications of similar offenses in that jurisdiction?

Statutes Involved.

The following are the Constitutional provisions and statutes directly involved or indirectly referred to in this petition:

(a) Constitution of the United States, Amendment XIV, Section 1:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdictions the equal protection of the laws."

(b) Judiciary Law of the State of New York §90:

* * *

> "2. The supreme court shall have power and control over attorneys and counsellors-at-law, and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; * * *

* * *

> "4. Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.

"Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys.

* * *

"7. In addition to the duties prescribed by section seven hundred of the county law, it shall be the duty of any district attorney within a department, when so designated by the justices of the appellate division of the supreme court in such department, or a majority of them, to prosecute all proceedings for the removal or suspension of attorneys and counsellors-at-law or the said justices, or a majority of them may appoint any attorney and counsellor-at-law to conduct a preliminary investigation and to prosecute any disciplinary proceedings and, during or upon the termination of the investigation or proceedings, may fix the compensation to be paid to such attorney and counsellor-at-law for the services rendered which compensation shall be a charge against the county specified in his certificate and shall be paid thereon." Chapter 30 of the Consolidated Laws of the State of New York, Article 4, §90 (2, 4, 7).

Statement of Case.

Petitioner, the accused in a disciplinary proceeding against an attorney, has been disbarred upon findings, in essence, of unauthorized compromise of a client's cause and temporary invasion of that client's funds, including the perpetration of criminal acts in furtherance thereof. The charge of unauthorized compromise was "found" by the referee upon his rejection of the case in rebuttal rather than upon the affirmative finding of substantiating evidence of misconducts. Indeed, the character and

inabilities of the complainant and the absence of corroboration precluded an affirmative finding. However, the necessity for making the affirmative finding was assured under due process in a disciplinary proceeding, and the findings are therefore defective.

The petitioner had urged close attention to the absence of affirmative evidence and to the quasi-criminal character of the proceeding in argument to both the referee and to the court in opposition to confirmation of the findings. Upon confirmation, the petitioner propounded the full Constitutional arguments replete with case law in motions for reargument and leave to appeal, and again on appeal.

Similarly, the arguments of the discriminatory nature of the punishment were asserted upon motions for reargument and leave to appeal, and on appeal.

The petitioner's motions to the Appellate Division (the court of first instance in this proceeding) for reargument, leave to appeal, and temporary stays were denied in all respects. An appeal as of right was concurrently taken. Motion to dismiss petitioner's appeal as of right to the Court of Appeals was granted and petitioner's cross motions for leave to appeal and for temporary stays pending appeal or pending the present petition for writ of certiorari were denied in all respects. Petitioner has exhausted his state remedies.

ARGUMENT.

I.

Disbarment predicated upon a mere preponderance of the evidence is procedurally insufficient under due process.

The proposition, simply stated, is that charges leading to disbarment cannot be sustained on a mere preponderance of the evidence. The "transcending" interest at stake requires a greater "certitude" in the proof. *Matter of Winship*, 397 U. S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970).

At issue is the contested charge of unauthorized compromise. A second charge, temporary invasion of that same client's funds, had been conceded throughout. The charges, in part, alleged the perpetration of crimes.

The referee did not affirmatively find for evidence in substantiation of the charge. In lieu of that, he rejected the case in rebuttal (Report, pp. 13-26). Disbarment on such findings is Constitutionally infirm. Indeed it is arguable whether the rejection of the rebuttal is the true converse of the finding of affirmative substantiating evidence for the purpose of satisfying even the mere "probability" of truth inherent in the lesser burden of preponderance, were that the applicable burden. *Commissioner of Public Welfare v. Ryan*, 238 App. Div. 607, 265 N. Y. S. 286 (1st Dep't 1933).

The prosecution had rested almost exclusively on the probative value of the complainant's inability to recall either certain key communications or the execution of contested documents. However, the non-recollections were uniquely unreliable, her memory having been generally debilitated by electric shock therapy (Hearing Minutes.

pp. 26-30). Thus she similarly had no recollection of wholly *un*contested documents parallel to those in issue (Hearing Minutes, pp. 18 as compared to 64, and pp. 32 as compared to 74-76). A full inquiry into complainant's credibility was prevented by the referee, over the accused's exception to the record (Hearing Minutes, pp. 104-108). The complainant's father, called for corroboration at the insistence of the referee, could not provide a scrap of evidence in support of the charges (Hearing Minutes, pp. 970-974). The testimony of questioned document experts called by both sides was dismissed *in toto* by the referee (Report, pp. 16, 18). The prosecution thus rested leaving the record devoid of affirmative proof of the charges upon which the referee could rely.

The referee, however, did not require such affirmative proof. The evidence he accepted instead is self-explanatory and appears at pages 13 to 26 of the Report. It is exclusively a point by point rejection of the case adduced by the accused in rebuttal of the charges. In sustaining the charges on that evidence alone, the referee had in fact required that the accused exonerate himself irrespective of the prosecution's inability to make an affirmative showing. Indeed, it is relevant that the referee had stated as to a separate issue:

> "Though I do not know the true explanation, I feel sure it was not the one advanced by the [accused]" (Report, p. 9).

The referee listed, at page 26 of the Report, the "pieces" that the prosecution had alleged but could not prove. He stated that they "fall into place" when he concludes that the accused "planned to keep [the complainant] in ignorance of the * * * settlement" (Report, p. 26). And he reached that conclusion, as a finding of fact, from the aforementioned discussion in the Report—the rejection of the rebuttal evidence alone. Unaccom-

panied by a finding of the affirmative evidence (the "pieces" which the referee enumerates), the findings are insufficient as a matter of law, because the consequences of the proceeding require proof of guilt by a higher standard of proof.

The New York courts denominate the disciplinary proceeding against an attorney as a civil action, *In re Ropiecki*, 282 N. Y. S. 947, 949, 246 App. Div. 80 (1935); *Matter of Zuckerman*, 20 N. Y. 2d 430, 438, 285 N. Y. S. 2d 1 (1967); *Matter of Randel*, 158 N. Y. 216, 52 N. E. 1106 (1899), and require no special quality of proof.

But the special character of this "civil" action is twofold: first, that it determines the truth of an accusation and redresses a misconduct in the name of the public good; and second that it metes punishment upon the offender calculated to deprive and exemplify the offender for its deterrent effect. In no sense does the disciplinary proceeding endeavor to make whole the aggrieved or adjudicate the competing rights of litigants. Indeed, it is "civil" solely by its arbitrary denomination as such, and thereupon by the procedures employed. Thus, civil in name and penal in effect, it is no less than hybrid.

Because of this special character, the disciplinary proceeding has been acknowledged by the New York courts to be of a quasi-criminal and public nature. In the *Matter of an Attorney*, 83 N. Y. 164, 166 (1880), citing *In re Kelly*, 59 N. Y. 495 *(sic)*; Judiciary Law §90(7).

Its unique character exacts, under the standard of due process, unique requirements. As stated in *In re Ruffalo*, 390 U. S. 544, 20 L. Ed. 2d 117, 88 S. Ct. 1222 (1968):

> "Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. *Ex parte Garland*, 4 Wall. 333, 380; *Spevack v.*

> *Klein,* 385 U. S. 511, 515. He is accordingly entitled to procedural due process * * *." 390 U. S. at 550.

and:

> "These are adversary proceedings of a quasi-criminal nature. Cf. *In re Gault,* 387 U. S. 1, 33." 390 U. S. at 551.

In *Friedman v. State,* 24 N. Y. 2d 528, 301 N. Y. S. 2d 484, 249 N. E. 2d 369 (1969), amended on other grounds 25 N. Y. 2d 905, 304 N. Y. S. 2d 597, 252 N. E. 2d 131, appeal dismissed 90 S. Ct. 1121, 397 U. S. 317, 25 L. Ed. 2d 337, a removal proceeding against a judge, it was stated in the dissenting opinion of Judge Burke:

> "It is far too late to assert that the 'traditional' nature of removal proceedings can insulate them from the mandates of the Constitution (see, e. g., *Matter of Ruffalo,* 390 U. S. 544; *Spevack v. Klein,* 385 U. S. 511). One of the constitutional mandates is that no man, not even a Judge, can be deprived of his liberty or property without due process of law." 24 N. Y. 2d at 544.

The mandates of procedural due process in quasi-criminal proceedings have been laid down by this court in *In re Gault,* 387 U. S. 1, 18 L. Ed. 2d 527, 87 S. Ct. 1428 (1967), the issue there being applied to a summary juvenile proceeding regarded as civil under state law. The very heart of *Gault* is that although an essentially criminal matter may be properly transmuted into a "civil" proceeding by the states, as an expediency justifiable by its service to a particular purpose, the transmutation cannot act to withdraw rights essential to due process. As stated in *In re Gault* at 387 U. S. 30:

> "We do not mean * * * to indicate that the hearing to be held must conform with all of the requirements of a criminal trial * * *; but we do hold that the hearing must measure up to the essentials of due process and fair treatment."

In the concurring opinion of Justice Black, at 387 U. S. 59, it was initially observed that the special procedure there was deemed civil rather than criminal, being intended, in part, to prevent full application of the Bill of Rights safeguards. As to this denial, it was therefore stated that "the Court here holds, however, that these * * * safeguards apply to protect a juvenile accused in a juvenile court on a charge under which he can be imprisoned for a term of years." 387 U. S. at 60.

Gault does not specify proof of guilt beyond a reasonable doubt to be one of the irrevocable safeguards guaranteed by the Constitution, and the question was not before this court.

But just three years later that question, the key question in the case at bar, came before this court in *Matter of Winship,* 397 U. S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). The "single" and "narrow" question before the court in *Winship* was whether or not due process required proof beyond a reasonable doubt in a "civil" proceeding essentially identical to that in *Gault.* The court in *Winship* unequivocally declared that it was the consequences of the proceeding that determine the burden of proof. Neither the name given the proceeding nor the standard of proof specified by statute or otherwise could obviate or substitute for this mandate of due process.

> "In effect the [New York] Court of Appeals distinguished the proceedings in question here from a criminal prosecution by use of what *Gault* called the '"civil" label-of-convenience which has been attached to juvenile proceedings.' 387 U. S., at 50. But *Gault* expressly rejected that distinction as a reason for holding the Due Process Clause inapplicable to a juvenile proceeding. 387 U. S. at 50-51" (397 U. S. at 365).
>
> "*Gault* decided that, although the Fourteenth amendment does not require that the hearing at this stage conform with all the requirements of a

criminal trial or even of the usual administrative proceeding, the Due Process Clause does require application during the adjudicatory hearing of 'the essentials of due process and fair treatment.' *Id.* at 30. This case presents the single, narrow question whether proof beyond a reasonable doubt is among the 'essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult" (397 U. S. at 359).

"Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged" (397 U. S. at 364).

"As we said in *Speiser v. Randall, supra,* at [357 U. S. 513] 525-526: 'There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of * * * persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of * * * convincing the factfinder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue'" (397 U. S. at 364).

Winship flatly declared proof beyond a reasonable doubt to be a requirement of Constitutional magnitude in that proceeding, due process there mandating that the trier of fact be impressed with the necessity of reaching a subjective state of certitude on the facts in issue. 397 U. S. at 364. In so doing, *Winship* is dispositive of

the issues at bar, save one: that of whether or not disbarment is an adjudication affecting "an interest of transcending value." Yet it cannot seriously be proposed that disbarment could be otherwise. See, e. g., *Sperack v. Klein*, 385 U. S. 511, 514-516, 17 L. Ed. 2d 574, 87 S. Ct. 625, 636 (1967).

This court has fully acknowledged that various proceedings of a non-criminal or quasi-criminal nature require higher burdens of proof. *Woodby v. Immigration Service*, 385 U. S. 276, 284-286, 17 L. Ed. 2d 362, 87 S. Ct. 483 (1966).

So too have the New York courts adopted and long required higher[1] burdens of proof in diverse civil actions.[2]

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[1]It has been said, under the New York cases, that "clear and convincing" is a higher burden than "preponderance," yet not so high as "beyond a reasonable doubt." *Commissioner of Public Welfare v. Ryan, supra.* Alternatively, it has been suggested that "clear and convincing" differs from "preponderance," not in the quantum of proof but in its quality. *McKeon v. Van Slyck*, 223 N. Y. 392, 397, 119 N. E. 851, 852; *Southard v. Curley*, 134 N. Y. 148, 31 N. E. 330, 16 L. R. A. 561. However defined, the effect of this intermediate burden is to reflect a policy interest in requiring something more than the simple probability in "preponderance," yet not the degree of certainty requisite to a criminal conviction. Presumably, therefore, the categories of cases in which clear and convincing evidence is required are those in which, while civil matters, the proponent should succeed only upon the showing of a clear affirmative case, not to a point of certainty but beyond speculative implication. *Woodby, supra*, 385 U. S. 276 at 285.

[2]E. g., *Ross v. Food Specialities, Inc.*, 6 N. Y. 2d 336, 160 N. E. 2d 618, 189 N. Y. S. 2d 857 (reformation); *Commissioner of Public Welfare v. Ryan*, 238 App. Div. 607, 265 N. Y. S. 286 (filiation proceeding); *Matter of Cady*, 211 App. Div. 373, 207 N. Y. S. 385 (1925) (claim against deceased and consent to trustee's investments); *Tousey v. Hastings*, 194 N. Y. 79, 86 N. E. 831 (1909) (contract to bequeath); *Taylor v. Higgs*,

And the imposition of the criminal standard of proof is settled law both in disciplinary proceedings against attorneys in some jurisdictions, although not in New York, *People ex rel. Cline v. Kerker,* 315 Ill. 572, 146 N. E. 439 (1925), and in disciplinary proceedings in other professions in jurisdictions including New York, *Meyer v. Stein,* 161 Misc. 91, 290 N. Y. S. 467 (1965), affirmed without opinion 247 App. Div. 865, 288 N. Y. S. 743 (1st Dep't 1936); 1934 Op. Att. Gen. 224.

Moreover, as a matter of policy, the courts of New York do not proceed with disciplinary prosecution where the offending acts are unrelated to the dispatch of professional duties; the courts there awaiting a criminal adjudication upon which discipline is derivatively predicated. *The Rochester Bar Association v. Dorthy,* 152 N. Y. 596, 46 N. E. 835 (1897). In so doing, the New York courts have taken cognizance of the close relationship of the disciplinary proceeding to the criminal prosecution, and therefore of the opportunity for abuse in the disciplinary prosecution of an attorney in a non-criminal forum.[3] As well stated in *In re an Attorney,* 175 App. Div. 653, 161 N. Y. S. 504, 508 (1916):

(Footnote continued)

202 N. Y. 65, 95 N. E. 30 (1911); *Wallace v. Wallace,* 216 N. Y. 28, 109 N. E. 872 (1915); *Woodward v. Vanier,* 248 App. Div. 792, 289 N. Y. S. 165 (1936) (contract to make payments in will); *In re Ungara's Estate,* 183 Misc. 907, 51 N. Y. S. 2d 286 (1944) (proof of gift from decedent); *In re Bekker's Estate and In re French,* 283 App. Div. 609, 129 N. Y. S. 2d 126 (1954) (contract to make reciprocal wills); *Streeter Construction Co. v. Kenny,* 209 App. Div. 697, 205 N. Y. S. 611 (1924) (agreement to hold deed as mortgage); *Castellani v. Castellani,* 176 Misc. 763, 28 N. Y. S. 2d 879 (1941) (validity of common-law marriage).

[3]Indeed, the various jurisdictions have long struggled with the question of the standard of proof required in a disciplinary proceeding (cf. Annot. 105 ALR 985 [1936]) and with the related questions of the applicability of the presumption of innocence (cf. Annot. 7 ALR 93 [1920]) and the necessity to defer to a criminal proceeding (cf. Annot. 90 ALR 1111 [1934]).

"The evidence to sustain charges such as have been here made and in a proceeding of this kind should be clear and satisfactory and convincing. The respondent is presumed to be innocent and proof of his guilt should be clearly established. This is especially true where, as in this case, the charges, if true, constitute violations of the criminal law. There is another remedy against the respondent. The criminal courts are open for his prosecution. If he is convicted of a felony, as he should be if these charges are true, disbarment will follow automatically and swiftly. We should not, except in a very clear case, anticipate what the verdict of a jury might be. We do not intend to imply that no action should ever be taken in a proceeding of this kind in advance of the action of the criminal courts; but where a doubtful question of fact exists, and that doubt can best be resolved by a jury in an appropriate tribunal equipped for the determination of such questions of fact, we should hesitate to take action based on the guilt of the respondent, when our action might be at variance with the pronouncement of a jury on the same question. After a careful analysis of the evidence, we have concluded that the charges against the respondent have not been established by satisfactory evidence.

"The report of the referee is therefore set aside, and the proceeding dismissed. All concur" (161 N. Y. S. at 508).

Yet the Departments of the Appellate Division in New York make no requirement that proof of charges against an attorney be established upon more than the minimum fair preponderance (*In re an Attorney*, quoted, *supra*, being a rare exception). *In re Ropiecki*, 246 App. Div. 80, 282 N. Y. S. 947, 949 (1935); *Matter of Zuckerman*, 20 N. Y. 2d 430, 438, 285 N. Y. S. 2d 1 (1967). In so doing, those decisions have relied upon the rather early New York Court of Appeals decision in *In re Randel*, 158 N. Y. 216, 52 N. E. 1106 (1899), but neither *Randel* nor any other opinion of the Court of Appeals had so

held. *Randel* went no further than to hold that "the statutory rule of * * * presumption [of innocence] * * * does not apply." 158 N. Y. at 219. In declaring such proceedings to be civil, the very ordinary civil standard of proof was apparently assumed to be applicable. This assumption has not only been premature, but also a denial of due process in the appropriate case. And seventy-two year old *Randel* is itself of dubious validity under the holdings of *Gault, Winship, Spevack v. Klein*, and *Woodby v. Immigration, supra.*

It may be that the infirmities of the New York disciplinary procedure can be remedied by initiating the policy application of an intermediate standard of proof to these cases. Clearly, however, New York cannot constitutionally continue to abide disbarment without "a subjective state of certitude on the facts in issue" (*Winship*, 397 U. S. at 364), particularly where, as here, crimes are charged.

The case at bar illustrates this infirmity, not because of factual error alone, but rather because that error sprang from the procedural condonation of marginal proof. Due process mandated a wider margin of safety than was here accorded.

II.

The discipline imposed is extraordinarily severe and discriminatory.

The charges of the unauthorized compromise of a client's cause and temporary use of that client's funds have been found and confirmed, and the accused attorney has been ordered disbarred by the New York courts. Although these misconducts are only partially conceded, they are assumed here *ad arguendo*, and discussion is

limited to the extraordinary severity of this discipline under the New York precedents, as a deprivation of equal protection.

Section 90(2) of the Judiciary Law of the State of New York provides no standard by which the misconduct may be gauged and a commensurate discipline imposed. The New York courts are left to weigh each case on its particular facts and assess punishment as they see fit within their sound discretion, the usual consideration being whether the character of the offense is such as to render the respondent unfit to remain upon the roll of attorneys, or whether it may be so excused that a punishment less severe would adequately meet the exigencies of the case. *In re V*, 10 App. Div. 491, 513, 42 N. Y. S. 268 (2nd Dep't 1896).

Logically, disbarment is appropriate where the misconduct reasonably implies a jeopardy to public welfare in permitting the respondent continuance in his profession. Thus, it might be appropriate where the acts are of a repetitive nature. *In re O'Doherty*, 14 A. D. 2d 4, 217 N. Y. S. 2d 961 (1st Dep't 1961), affirmed 11 N. Y. 2d 1028, 230 N. Y. S. 2d 26, 183 N. E. 2d 909. As a matter of policy in New York, disbarment follows conviction of a felony. Judiciary Law §90(4). A single incident does not invoke disbarment unless the misconduct is so severe that it evinces a dishonesty or a moral turpitude. *In re Darmstadt*, 35 App. Div. 285, 55 N. Y. S. 22 (2nd Dep't 1898); *In re Knight*, 264 App. Div. 106, 34 N. Y. S. 2d 810 (1st Dep't 1942), app. den. 264 App. Div. 852, 36 N. Y. S. 2d 187, appeal dismissed 290 N. Y. 871, 50 N. E. 2d 250, cert. den. 64 S. Ct. 266, 320 U. S. 798, 88 L. Ed. 481, rehearing den. 64 S. Ct. 634, 321 U. S. 803, 88 L. Ed. 1090.

It is appropriate to examine the two cases upon which the New York courts relied as authority for the im-

position of the punishment in this particular matter. In *Matter of Hoffman,* 30 A. D. 2d 163, 291 N. Y. S. 2d 260 (1st Dep't 1968), Hoffman was found guilty of forging endorsements to the settlement checks of *seven* different clients, of having converted the proceeds *in each case,* and of having engaged in a *course of conduct* of issuing worthless checks. No restitution is mentioned, nor any other mitigating factor. In *Matter of Whitaker,* 30 A. D. 2d 162, 291 N. Y. S. 2d 173 (1st Dep't 1968):

> "There were three serious charges made against respondent involving the conversion of funds deposited with him in escrow, the issuance of *36* worthless checks drawn on his personal and special accounts and the conversion of the sum of $15,000 from a client upon the representation that said sum would be invested on her behalf. In addition, respondent was charged with having unreasonably failed to co-operate with petitioner's Committee on Grievances, in its initial investigation, in that he failed to appear for a scheduled interview, failed to submit a statement to the committee explaining his position concerning the matters before it and failed to communicate with counsel for the committee." (Italics supplied.)

The key factor in both cases is that the misconducts were of a repetitive nature involving the affairs of many clients, in sharp contrast to the case at bar. As stated in *Whitaker* at page 163:

> "Respondent's behavior demonstrates a *pattern of consistent misconduct and a complete disinterest by him in his professional obligations.* Respondent clearly lacks the character and fitness required of an attorney at law." (Italics supplied.)

This key criterion for complete disbarment, repetitive conduct, is the basis of the belief in there being jeopardy to the public welfare and thus is the very predicate of the attorney's removal from the profession. It is pre-

cisely this element of repetition that is totally absent from the case at bar.

Nor do the New York courts view the acts herein as those evincing moral turpitude. The misconducts charged, together with the mitigating factors shown, have been before the New York courts from time to time. The cases themselves demonstrate by comparison the exceptional nature of the degree of punishment imposed in this case and remarkable non-uniformity of punishments.

In *Matter of Gilbert*, 30 A. D. 2d 369, 292 N. Y. S. 2d 132 (1st Dep't 1968), the attorney had forged his client's name to a settlement check, converted the proceeds, made false representations to his client about delay in receipt of the settlement fund, failed to make payment despite demands until after investigation, and issued worthless checks against his account. The court in mitigation noted only that the attorney was contrite, that there had been no other incident, and his laborious efforts to achieve professional status. He was suspended for one year.

In *Matter of Doherty*, 28 A. D. 2d 546, 280 N. Y. S. 2d 340 (2nd Dep't 1967), the attorney had commingled funds, had failed to repay the funds, and had been neglectful in the handling of the client's case. Because of the absence of apparent fraudulent intent and the death of the attorney's wife at a time proximate to the misconducts, the court ruled for censure.

In *Matter of Pinckney*, 276 App. Div. 700 96 N. Y. S. 2d 865 (1st Dep't 1950), the attorney had misused estate funds but, in light of restitution and the lack of evil intent, the court ruled for censure.

In *Matter of Colwin*, 12 A. D. 2d 83, 208 N. Y. S. 2d 127 (1st Dep't 1960), the attorney had commingled and converted client's funds. In mitigation, it was found that the attorney had been in economic distress and at the

mercy of ruthless loan sharks, that he was cooperative and had no dishonest intent, that he had made full restitution at the time of the complaint and had other funds out of which payment could have been made. He was censured.

In *In re Griggs,* 282 App. Div. 263, 122 N. Y. S. 2d 872 (1st Dep't 1953), the attorney had converted several clients' funds. There was, however, restitution, no apparent dishonest intent, and the attorney had been cooperative. The court imposed a three-month suspension.

In *In re First,* 264 App. Div. 105, 34 N. Y. S. 2d 642 (1st Dep't 1942), the attorney converted client's money but the court also found, as mitigating factors, the attorney's illness, financial difficulty, ultimate restitution, and cooperativeness with the court and ruled for a three-month suspension.

In *In re Siegel,* 266 App. Div. 343, 42 N. Y. S. 2d 320 (1st Dep't 1943), the attorney had issued bad checks and converted escrow funds. Without any case in mitigation, the attorney was suspended for three months.

In *In re Putsche,* 264 App. Div. 113, 34 N. Y. S. 2d 616 (1st Dep't 1942), the attorney had converted client's funds and later made restitution. He was suspended for three months.

In *In re Kaufman,* 32 A. D. 2d 358, 303 N. Y. S. 2d 165 (1st Dep't 1969), the attorney had issued twenty-nine worthless checks and converted escrow funds. The court noted that the attorney had been an infrequent depository of clients' funds, that the infraction had been isolated in his long career, that there had been restitution, and that the attorney was contrite and cooperative. The respondent was suspended for six months.

In *In re Gruskin,* 265 App. Div. 933, 38 N. Y. S. 2d 628 (1st Dep't 1942), the attorney was guilty of commingling and conversion, distributions from his escrow account had been dishonored for insufficient funds, and restitution had been only partial. Moreover, he had tendered false explanations to the referee, put in no case in mitigation, and it was found that the misuse was intentional. The attorney was suspended for one year.

In *Matter of Smith,* 34 A. D. 2d 444, 312 N. Y. S. 2d 499 (2nd Dep't 1970), the attorney commingled and converted client's funds and restitution checks were dishonored for insufficient funds. The court noted that the attorney had been preoccupied with another business, that there had ultimately been restitution for all but a small sum, that the acts were not indicative of an intent to defraud or deprive, that this was his first infraction, and that the attorney had been forthright with the court. The court ruled for censure.

In *In re Hendricks,* 229 App. Div. 100, 241 N. Y. S. 50 (1st Dep't 1930), the attorney directed office staff to forge a release. The referee had found some evidence that the attorney may have had such authority. The attorney was suspended for one year.

In *In re Ludden,* 239 App. Div. 548, 268 N. Y. S. 123 (1st Dep't 1933), attorneys concealed a default incurred by their own neglect from their client and forged her signature to an affidavit on their motion to restore the case to the calendar. They were suspended for one year.

The discipline imposed in these cases ranged from censure to a one-year suspension. Yet suspensions for periods of several years are not unknown. Compare, for example, *Matter of Javits,* 35 A. D. 2d 442 (1st Dep't 1971), a case tried concurrently with the case at bar

and before the same court and referee, but where disbarment was apparently not warranted. In some, the misconducts were more serious than those at bar, in others less. And in some, the mitigating circumstances were as strong as those here and in others there were none at all.

The case at bar is one of a thirty-five year career otherwise unblemished, and the misconducts are five years past. All the charges refer to the handling of a single case wherein the relationship with the client had been unique to the attorney and in the nature of *in loco parentis* and as financial conservator. The critical illness of his son, concurrent with the misconducts, may have temporarily diverted his close attention to his professional responsibilities. The client conceded the absence in fact of loss or delay by virtue of the misconduct, and the attorney's conduct at no point evinced an evil intent. The attorney, throughout the proceeding, conducted himself in conformity with his obligations of cooperation with, and full disclosure to, the investigative authorities to the limit consonant with his conduct of his defense.

The charge of unauthorized compromise was vigorously contested. Rather than belabor a point by point narration of the overwhelming rebuttal evidence, let it suffice to say here that the client did not challenge the terms of the compromise, and thus asserted no loss.

While charges, as conceded here *ad arguendo*, constitute unprofessional conduct, they are not acts of dishonesty. Where, as here, the misconduct was isolated to a single client's affairs in a long unblemished career, and there was clearly no intent to defraud or deprive, disbarment is discriminatory, particularly in light of the strong evidence in mitigation. The application of a standardless statute as the predicate for the imposition of an unusual and discriminatory punishment violates most basic and

substantial legal rights of the accused attorney, those of due process and equal protection under the laws.

Conclusion.

In dismissing the appeal taken as of right and denying leave to appeal by permission, the New York Court of Appeals has declined a pronouncement of either the quality of proof requisite to a disciplinary proceeding or the standardization of the degree of discipline imposed. There continues therefore a custom and usage adopted by the lower courts which is at variance with this court's interpretations of due process and equal protection. It is respectfully requested that this court grant review of these questions.

Respectfully submitted,

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Of Counsel:

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JEFFREY STEPHEN RAMER,
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APPENDIX A.

Opinion.

SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

January 1971.

Harold A. Stevens, P. J.,
Louis J. Capozoli,
Owen McGivern,
Arthur Markewich,
George Tilzer, JJ.

IN THE MATTER

of

SAMUEL FIELDS, an Attorney.

Motion 4913

January 25, 1971

Disciplinary proceedings instituted by The Association of the Bar of the City of New York. Respondent was admitted to the Bar on May 8, 1935 at a Term of the Appellate Division of the Supreme Court in the Second Judicial Department. By order entered January 6, 1970, George Trosk, Esq., was appointed Referee to take testimony and report to this court.

Clarence Fried of counsel (Jeffrey Stephen Ramer with him on the brief; Hawkins, Delafield & Wood, attorneys) for respondent.

John G. Bonomi (Michael Franck with him on the brief) for petitioner The Association of the Bar of the City of New York.

PER CURIAM:

Respondent was admitted to practice in the Second Judicial Department on May 8th, 1935.

Serious allegations (one charge) of professional misconduct were preferred against respondent involving, among other things, comingling and converting a client's funds, settling the claim of a client and her two infant children without the client's knowledge or consent, forging his client's name to a petition and related documents seeking approval of the unauthorized settlement in the Surrogate's Court, falsely certifying a copy of the order issued by that court, thereby converted his client's funds. It appears that he made full restitution to his client for these conversions.

The Referee, in a painstaking report, has sustained all charges made against respondent and the record fully supports his findings. His report is confirmed.

The respondent has been guilty of professional misconduct of the type which demonstrates his unfitness to continue as a member of the Bar. *(Matter of Hoffman,* 30 A. D. 2d 163.) In view of the gravity of his misconduct respondent should be disbarred. *(Matter of Whitaker,* 30 A. D. 2d 162.)

All concur.

APPENDIX B.

Order.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 20, 1971.

Present:

Hon. Harold A. Stevens,
Presiding Justice.
Louis J. Capozzoli,
Owen McGivern,
Arthur Markewich,
George Tilzer,
Justices.

In the Matter

of

Samuel Fields (admitted as Samuel Feldstein), an Attorney.

M-4913

The Association of the Bar of the City of New York, by John G. Bonomi, Esq., its attorney, having presented to this Court on December 15, 1969, a petition containing charges of professional misconduct against the above-named respondent, Samuel Fields (admitted as Samuel Feldstein), who was admitted to practice as an attorney and counselor-at-law in the State of New York on May 6, 1935, at a term of the Appellate Division of the Su-

preme Court, Second Judicial Department, and having petitioned the Court to take such action upon such charges as in the judgment of said Court justice may require; and the respondent having appeared herein by his attorneys, Messrs. Hawkins, Delafield & Wood, and having interposed an answer to said petition, duly verified December 10, 1969, and the Court having duly made and entered an order on January 6, 1970, appointing George Trosk, Esq., as Referee herein to take testimony in regard to said charges and to report to this Court his opinion thereon; and a hearing, pursuant to said order of reference having been duly held before said Referee and said Referee having duly heard the testimony and proofs tendered by the parties hereto, and having thereafter rendered his report thereon to this Court, which report was dated June 23, 1970, and was filed in the office of the Clerk of this Court on September 14, 1970;

And the petitioner thereafter and on November 23, 1970, having moved for an order confirming the Referee's report and adjudging the respondent guilty of professional misconduct and that the Court take such action herein as it might deem just and proper;

Now, upon reading the petition of The Association of the Bar of the City of New York, verified October 24, 1969, the affidavit of John G. Bonomi, Esq., annexed thereto, sworn to October 24, 1969, the notice of presentation of said petition, dated October 24, 1969, with proof of the service thereof upon the respondent, the answer of the respondent to said petition, verified December 10, 1969, the order of this Court dated January 6, 1970, appointing George Trosk, Esq., as Referee herein, all of which papers were duly filed in the office of the Clerk of this Court on January 6, 1970, the report of George Trosk, Esq., the Referee herein, dated June 23, 1970, together with the testimony taken by him and

the exhibits offered in evidence, which were filed in the office of the Clerk of this Court on September 14, 1970: and upon reading and filing the notice of motion for an order confirming the report of the Referee and adjudging the respondent guilty of professional misconduct, dated October 16, 1970, with proof of due service thereof, and after hearing Mr. John G. Bonomi for the motion, and Messrs. Hawkins, Delafield & Wood opposed, and due deliberation having been had thereon and upon the *Per Curiam* Opinion of this Court filed herein, and the Court having unanimously found and decided that the respondent has been guilty of professional misconduct in his office of attorney and counselor-at-law, it is hereby unanimously

ORDERED that the report of George Trosk, Esq., the Referee herein, filed in the office of the Clerk of this Court on September 14, 1970, be, and the same hereby is, confirmed; and it is further unanimously

ORDERED that said Samuel Fields (admitted as Samuel Feldstein) be and he hereby is disbarred from practice as an attorney and couselor-at-law in the State of New York, effective May 20, 1971; and it is further unanimously

ORDERED that the name of said Samuel Fields (admitted as Samuel Feldstein) be struck from the roll of attorneys and counselors-at-law in the State of New York, effective May 20, 1971; and it is further unanimously

ORDERED that said Samuel Fields (admitted as Samuel Feldstein) be and he hereby is commanded to desist and refrain from the practice of the law in any form, either as principal or agent, clerk or employee of another, effective May 20, 1971; and it is further unanimously

ORDERED that said Samuel Fields (admitted as Samuel Feldstein) be and he hereby is forbidden to appear as

an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, effective May 20, 1971, and it is further unanimously

ORDERED that said Samuel Fields (admitted as Samuel Feldstein) be and he hereby is forbidden to give to another an opinion as to the law or its application or any advice in relation thereto, effective May 20, 1971; and it is further unanimously

ORDERED that said Samuel Fields (admitted as Samuel Fieldstein) is directed to fully comply with the provisions of Title 22, Section 603.14, of the Rules of this Court, a copy of which is annexed hereto and made a part hereof.

Enter:

HYMAN W. GAMSO
Clerk.

Title 22, Section 603.14 of the Rules of the Appellate Division, Supreme Court, First Judicial Department.

"603.14. Conduct of disbarred, suspended and resigned attorneys.

(a) Compliance with Judiciary Law. Disbarred, suspended and resigned attorneys at law shall comply fully and completely with the letter and spirit of sections 478, 479, 484 and 486 of the Judiciary Law relating to practicing as attorneys at law without being admitted and registered, and soliciting of business on behalf of an attorney at law and the practice of law by an attorney who has been disbarred, suspended or convicted of a felony.

(b) Compensation. A disbarred, suspended or resigned attorney may not share in any fee for legal services performed by another attorney during the period of his removal from the bar. A disbarred suspended or resigned attorney may be compensated on a *quantum meruit* basis for legal services rendered and disbursements incurred by him prior to the effective date of the disbarment or suspension order or of his resignation. The amount and manner of payment of such compensation and recoverable disbursements shall be fixed by the court on the application of either the disbarred, suspended or resigned attorney or the new attorney, on notice to the other as well as on notice to the client. Such applications shall be made at special term in the court wherein the action is pending or at special term of the Supreme Court in the county wherein the moving attorney maintains his office if an action has not been commenced. In no event shall the combined legal fees exceed the amount the client would have been required to pay had no substitution of attorneys been required.

(c) Notice to clients not involved in litigation. A disbarred, suspended or resigned attorney shall promptly notify by registered or certified mail, return receipt requested, all clients being represented in pending matters, other than litigated or administrative matters or proceedings pending in any court or agency, of his disbarment or suspension or resignation and his consequent inability to act as an attorney after the effective date of his disbarment or suspension or resignation and shall advise said clients to seek legal advice elsewhere.

(d) Notice to clients involved in litigation. (i) A disbarred or suspended or resigned attorney shall promptly notify, by registered or certified mail, return receipt requested, each of his clients who is involved in litigated matters or administrative proceedings, and the attorney

or attorneys for each adverse party in such matter or proceeding, of his disbarment or suspension or resignation and consequent inability to act as an attorney after the effective date of his disbarment or suspension or resignation. The notice to be given to the client shall advise the prompt substitution of another attorney or attorneys in his place.

(ii) In the event the client does not obtain substitue counsel before the effective date of the disbarment or suspension or resignation, it shall be the responsibility of the disbarred or suspended or resigned attorney to move *pro se* in the court in which the action is pending, or before the body in which an administrative proceeding is pending, for leave to withdraw from the action or proceeding.

(iii) The notice to be given to the attorney or attorneys for an adverse party shall state the place of residence of the client of the disbarred or suspended or resigned attorney. In addition, notice shall be given in like manner to the Judicial Conference of the State of New York in each action in which a retainer statement has been filed.

(e) Conduct after entry of order. The disbarred or suspended or resigned attorney, after entry of the disbarment or suspension order, or after entry of the order accepting the resignation, shall not accept any new retainer or engage as attorney for another in any new case or legal matter of any nature. However, during the period between the entry date of the order and its effective date he may wind up and complete, on behalf of any client, all matters which were pending on the entry date.

(f) Filing proof of compliance and attorney's address. Within 10 days after the effective date of the disbar-

ment or suspension order or the order accepting the resignation, the disbarred or suspended or resigned attorney shall file with the Clerk of the Appellate Division an affidavit showing: (i) that he has fully complied with the provisions of the order and with these rules; and (ii) that he has served a copy of such affidavit upon the petitioner or moving party. Such affidavit shall also set forth the residence or other address of the disbarred or suspended or resigned attorney where communications may be directed to him.

(g) Required records. A disbarred or suspended or resigned attorney shall keep and maintain records of the various steps taken by him under these rules so that, upon any subsequent proceeding instituted by or against him, proof of compliance with these rules and with the disbarment or suspension order or with the order accepting the resignation will be available."

APPENDIX C.

Order.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 3, 1971

Present:

Hon. Harold A. Stevens,
Presiding Justice,
Louis J. Capozzoli,
Owen McGivern,
Arthur Markewich,
George Tilzer,
Justices.

IN THE MATTER

of

SAMUEL FIELDS (admitted as Samuel Feldstein), an Attorney.

M-6719

An order of this Court having been made and entered herein on April 20, 1971, disbarring the above-named respondent, Samuel Fields (admitted as Samuel Feldstein) from practice as an attorney and counselor-at-law in the State of New York effective May 20, 1971, and said respondent having moved this Court for leave to reargue Motion No. M-4913, for permission to appeal to

the Court of Appeals, and for a stay of the order of this Court entered on April 20, 1971 pending such reargument and said appeal,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Jeffrey Stephen Ramer in support of said motion and the affidavit of Martin J. Linsky in opposition thereto, and after hearing Mr. Jeffrey Stephen Ramer for the motion and Mr. Martin J. Linsky opposed,

It is ordered that said motion be and the same hereby is, in all respects, denied. The stay, dated May 18, 1971, affixed to the notice of motion is vacated. Respondent shall, within thirty days from the date of this order, comply with this Court's order of disbarment entered on April 20, 1971.

Enter:

HYMAN W. GAMSO
Clerk.

APPENDIX D-1.

Order Granting Motion to Dismiss Appeal.

STATE OF NEW YORK.

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventh day of July A. D. 1971.

Present.

Hon. Stanley H. Fuld, Chief Judge, presiding.

IN THE MATTER

of

SAMUEL FIELDS, an Attorney.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent,

SAMUEL FIELDS,

Appellant.

1 Mo. No. 610

A motion having hereto been made herein upon the part of the respondent to dismiss the appeal taken as

of right by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

A copy

GEARON KIMBALL
Deputy Clerk

(Seal.)

APPENDIX D-2.

Order Denying Motion for Leave to Appeal and for a Stay.

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventh day of July A. D. 1971.

Present,

Hon. Stanley H. Fuld, Chief Judge, presiding.

IN THE MATTER

of

SAMUEL FIELDS, an Attorney.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent,

SAMUEL FIELDS.

Appellant.

1 Mo. No. 610

Motions for leave to appeal to the Court of Appeals and for a stay in the above cause having heretofore been

made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motions be and the same hereby are denied.

A copy

GEARON KIMBALL
Deputy Clerk

(Seal.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-438

SAMUEL FIELDS (Admitted as SAMUEL FELDSTEIN),
an Attorney,

Petitioner,

—v.—

THE ASSOCIATION OF THE BAR OF THE
CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-438

SAMUEL FIELDS (Admitted as SAMUEL FELDSTEIN),
an Attorney,

Petitioner,

—v.—

THE ASSOCIATION OF THE BAR OF THE
CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

This is a petition for a writ of certiorari to review orders of the Court of Appeals of the State of New York, entered on July 7, 1971, denying petitioner's motion for leave to appeal and granting respondent's motion to dismiss an appeal taken as of right from orders of the Appellate Division, First Department (hereinafter referred to as "the Appellate Division"), made and entered on April 20, 1971, and June 3, 1971, disbarring petitioner and denying his motion for leave to reargue, respectively.

Statement of the Case

Although a statement of the case is contained in the petition, respondent finds it necessary, in accordance with Rule 40 (3) of the Revised Rules of this Court, to submit a supplemental statement setting forth additional facts which, in respondent's view, are essential to a determination of the petition.

The petition seeks to leave the impression that petitioner was disbarred on the basis of a record devoid of any affirmative evidence of the misconduct charged. This claim can only be described as a gross misrepresentation of the proceeding and requires respondent to demonstrate the overwhelming evidence adduced.

On August 23, 1962, the complainant's husband died as a result of injuries sustained in an accident, leaving the complainant widowed at the age of 19 with two infant children (Min. pp. 2-4). The complainant, thereafter, retained petitioner (Min. pp. 4-5) to prosecute claims arising out of the accident against her deceased husband's employer ("Protective") and the owner of the shipyard at which the accident took place ("Hitchcock").

In January 1963, petitioner settled the claim against Protective for $27,400 (Pet. Ex. 4),* the clients' share of that recovery to be divided among the complainant individually and among each of her two infant children. In February 1963, the complainant's personal share of this settlement, amounting to $5,577.78, was by agreement (Pet. Ex. 6A) entrusted to petitioner to be disbursed in accordance with instructions received from the complainant and

* Respondent here was petitioner below and vice versa.

her father. Petitioner converted at least $3,800 of this sum to his own use without authority. One allegation of the charge which resulted in petitioner's disbarment was predicated upon this admitted use of client funds without authority.

Petitioner continued to represent the complainant and her two infant children in their claim against Hitchcock. He ultimately instituted suit in the Federal Court in Connecticut. Petitioner settled this claim in the summer of 1965 for $4,800. Out of the net proceeds thereof the complainant was to receive $906.06 and each of her two infant children was to receive $906.07. The circumstances surrounding this settlement and the disposition of the proceeds were the subject of the remaining allegations of the charge resulting in petitioner's disbarment.

It was charged, in substance, that petitioner had entered upon the settlement without the complainant's knowledge or consent, had signed her name without authority to the petition seeking approval of the settlement by the Surrogate's Court (necessitated by the fact that complainant was prosecuting the claim as the representative of her husband's estate), had endorsed the complainant's signature on the three checks in payment of the net proceeds (one to the complainant personally and the other two to the complainant as guardian of each of her children) and had converted the proceeds of these checks, amounting to approximately $2,700, to his own use without authority. The use of the settlement proceeds without authority was admitted. The allegations involving unauthorized settlement of the claim were denied.

Petitioner was never charged with the commission of a crime. He was charged with professional misconduct on

the basis of the conduct alleged. It is true that his conduct might also justify criminal charges but that fact no more transforms a disciplinary proceeding into a criminal prosecution than does the underlying larcency in a civil suit for recovery of the proceeds converted.

We now turn to a discussion of the evidence adduced by respondent in support of the contested portion of the charge and relied upon by the Referee in response to petitioner's claim that no such evidence was adduced:

(1) Referee's Report, page 25: During the course of his negotiations with the attorney for the defendant Hitchcock which led to the settlement of the claim, petitioner requested that the settlement be paid without obtaining approval of the Surrogate's Court (Min. pp. 328-9). This request itself was improper in that the complainant was bringing the action pursuant to limited letters of administration issued by the Court and its approval of any settlement was needed. Had this improper request been agreed to by the attorney for the defendant, it would have obviated the necessity for preparing a petition seeking Court approval to which, it was charged, petitioner signed the complainant's name without authority.

Petitioner at first denied ever having requested that the settlement be paid without obtaining approval of the Surrogate's Court (Min. pp. 498-498A) and altered his testimony only after respondent, in the course of a preliminary hearing, produced the attorney for the defendant who testified that such a request had indeed been made but rejected (Min. pp. 334, 498A-9).

(2) Referee's Report, page 17: Petitioner thereafter prepared a petition seeking approval of the settlement by the

Surrogate's Court (Pet. Ex. 12). This petition bears the complainant's signature in five places. On some of the same pages, respondent's signature appears also. In addition, respondent's signature appears by itself. Although the petition is a ribbon original, each of these signatures is a carbon impression. Both petitioner and respondent produced handwriting experts who disagreed as to the genuineness of the complainant's signature appearing therein. The Referee refused to rely on either expert. He instead concluded, on the basis of photographic enlargements containing, in juxtaposition, reproductions of the disputed as well as concededly genuine signature of the complainant (Pet. Ex. 16), that the disputed ones were not written by the person who wrote the authentic ones.

(3) Referee's Report, page 18: Petitioner contended before the Referee that he had mailed the petition seeking approval of the settlement (Pet. Ex. 12) to the complainant for execution and that she had returned it in the condition in which he filed it with the Surrogate's Court. Yet, each of the complainant's signatures appearing therein was accompanied by a certification by petitioner that the signature had been personally signed in his presence.

(4) Referee's Report, pages 23-4: The petition (Pet. Ex. 12) contains a number of statements which the complainant would have known were untrue, had the petition ever actually been submitted to her, including the representation that petitioner had not been given any funds to defray the expenses of the claim against Hitchcock although, in fact, he had received $1,000 of the Protective settlement for that very purpose (Min. pp. 34-5, 472-3).

(5) Referee's Report, pages 15-16, 19: There is in existence no covering letter from petitioner to complainant forwarding the petition for execution (Min. p. 662). Other documents in evidence reveal that when petitioner concededly sent documents to the complainant for execution he would indicate by the initials "R.C." where she was to sign and did so even when the complainant's name was typed beneath the signature bar (Pet. Ex. 26). No such notation appears on the petition.

(6) Referee's Report, page 16: Petitioner testified before the Referee (Min. p. 696) that he had discovered the unusual circumstance that all signatures on the ribbon original of the petition were signed through carbon paper in 1965 upon allegedly receiving the executed petition through the mail from the complainant in that condition. Yet, at an interview with respondent's counsel in 1969 during the investigation prior to the formal proceeding, petitioner testified that he had not discovered the existence of the carbon signatures until 1969 when he was advised of the allegations of the complaint (Min. pp. 696-702). This interview was transcribed and a copy thereof was forwarded to petitioner who subsequently made written corrections but in no way altered his testimony in this regard.

(7) Referee's Report, pages 20-25: Petitioner prepared an order for the Surrogate's Court approving the Hitchcock settlement (Pet. Ex. 23) which differed materially from the order he had prepared authorizing the earlier Protective settlement (Pet. Ex. 22). The earlier order had properly provided that the checks payable to the complainant as guardian of her children for their share of the settlement be made payable jointly to the complainant and to

the Clerk of the Surrogate's Court. The order which petitioner prepared for approval of the Hitchcock settlement provided that the checks in payment of the childrens' share be made payable to the complainant alone.

When the latter order was submitted to the Surrogate's Court, it was entered (Pet. Ex. 23) with handwritten corrections requiring that the checks in payment of the childrens' share be made payable jointly to the complainant and the Clerk of the Surrogate's Court and further providing that the defendant would be released not "upon making the payments aforesaid" as the order prepared by petitioner provided but only after "filing receipts therefor" as well as per the handwritten insertion by the Court.

Upon entry of the order with the corrections noted, petitioner conformed every change, regardless of how minor it was, except those changes pertaining to the manner of making payment of the childrens' shares and the necessity for the defendant to file receipts for such payments. These were omitted. Petitioner then certified each page of a copy of the order incorrectly conformed as indicated as true and correct (Pet. Ex. 21) and then forwarded it to the attorneys for the defendant with a letter (Pet. Ex. 29) requesting prompt payment so that "my clients may have the use of the checks for the Christmas season," which was then some four weeks away. Petitioner, however, conceded that his client had not asked for any portion of the proceeds or any other monies in his possession (Min. pp. 702-4) and, in fact, upon receipt of the settlement checks, admittedly invaded the proceeds to his own use and forwarded not one cent to the clients.

(8) Referee's Report, pages 6-9: Upon receipt of the settlement proceeds in the form of three checks (Pet. Exs. 13-31 & 32) payable to the complainant, one to her individually and two to her as guardian of each of her children, petitioner admittedly endorsed her signature, without authorization (Min. p. 439), and deposited them one at a time in his account and converted the proceeds (Min. pp. 748-52). The first of these checks deposited by petitioner in his account (Pet. Ex. 13) bears the complainant's purported signature written through carbon paper in a handwriting different from petitioner's own and evidences the use of different pens for the various endorsements thereon.

(9) Referee's Report, page 19: In December 1966, a conference took place in petitioner's office at complainant's insistence at which she claimed she did not know the status of the Hitchcock claim and to which she brought another attorney whom she consulted for the purpose of representing her in determining the status of the matter (Min. p. 771ff). In the course of that conference, petitioner disclosed the Hitchcock settlement and claimed that the complainant had authorized it, a claim which the complainant denied. The attorney brought to this conference by the complainant testified that petitioner at that time (contrary to his later testimony before the Referee) claimed that the petition bearing the complainant's questioned signature had been executed by her personally in petitioner's presence (Min. p. 773).

(10) Referee's Report, pages 10-11: At the conclusion of the December 1966 conference petitioner paid the complainant all monies then due her and her children less some $850 which petitioner continued to hold to pay pos-

sible claims by the doctors and hospital predicated upon treatment rendered to the complainant's husband prior to his death (Min. pp. 84-7). Although petitioner claimed that he opened a special account to segregate client funds following the December 1966 conference, and that complainant had falsely accused him of settling the Hitchcock claim without her knowledge and consent at that conference, he thereafter invaded the money still in his possession to his own use without authority (Min. pp. 729-41).

(11) Referee's Report, page 28: In August 1968, when the statute of limitations expired with respect to any claim predicated upon the treatment of complainant's husband prior to his death, petitioner still had in his possession $502.25 to pay any possible claim by the hospital. He offered to turn over these monies, which were the complainant's property, only upon her executing a general release absolving petitioner of all liability (Pet. Exs. 14 & 26). This refusal to turn over trust funds without a general release for which no consideration was offered was the final element of the charge sustained by the Referee.

The foregoing recitation sets forth a portion of the overwhelming corroborative evidence adduced by respondent in support of the charge. The testimony of the complainant, that she knew nothing of the Hitchcock settlement until the December 1966 confrontation with petitioner, that she did not authorize such a settlement, that the petition seeking approval of the settlement by the Surrogate's Court did not bear her genuine signatures and that she never authorized petitioner to use any of her funds or her children's funds, has not even been referred to.

The petition (pp. 6-7) seeks to impeach the complainant's credibility, alleging that she had undergone shock therapy designed to dull her memory. That allegation is true insofar as it goes. The petition, however, fails to disclose a) that the shock therapy referred to was confined to a period in January 1963, in order to relieve the complainant's mind of the painful memory of the trauma associated with the death of her husband; and b) that the events involving the unauthorized settlement of the Hitchcock claim, which were the subject of the charge, did not begin until the summer of 1965 and could hardly have been affected by shock therapy administered some two and a half years earlier.

Inasmuch as the purpose of this statement of facts is to demonstrate the overwhelming affirmative evidence adduced in support of the charge, reference to the incredible inconsistencies in petitioner's testimony upon which the Referee also relied is intentionally omitted.

ARGUMENT

I.

A Disciplinary Proceeding Is Not a Criminal Case Within the Meaning of the Constitution and Does Not Require Proof Beyond a Reasonable Doubt.

The principal thrust of the petition is two-pronged. On the one hand, petitioner asserts, erroneously as our statement of facts clearly demonstrates, that he was disbarred without any significant affirmative evidence in support of the charge. On the other hand, relying principally on *Matter of Winship,* 397 U.S. 358 (1970), petitioner argues that proof of the charge in a disciplinary proceeding should be required beyond a reasonable doubt, the standard applicable in criminal cases.

Petitioner's reliance upon *Winship* is totally misplaced. For, as that decision itself is careful to note, the fact situation there considered involved charges of violation of the criminal law which, if established, would subject the delinquent to the loss of his liberty for up to six years, 397 U.S. at 365, 367, 368.

In contrast, a disciplinary proceeding does not involve charges of violation of the criminal law but rather charges of professional misconduct and can under no circumstances result in the loss of liberty of the individual against whom charges are brought. Thus, the very considerations which in *Winship* resulted in this Court holding that proof beyond a reasonable doubt was required are totally absent. The very reasoning of *Winship* leads to the conclusion,

therefore, that the burden of proof beyond a reasonable doubt is not applicable to a disciplinary proceeding.

This result is perfectly consistent with the distinction between a disciplinary proceeding, a standard criminal prosecution and the juvenile proceedings considered in *Winship*. The standard criminal prosecution or juvenile proceeding, as we have already noted, seeks to deprive the accused of his liberty. A disciplinary proceeding is, in essence, nothing more than a licensing hearing in which facts surrounding the conduct of the person accused are examined to determine whether he is entitled to a continuation of the license which, in the case of an attorney, grants him an absolute monopoly to provide access to the lay public to the administration of justice and to exercise the awesome powers attendant thereto.

The license to practice law constitutes a certification to the public that the holder has been examined with respect to both character and learning and has been found to be reliable. Clients must rely upon this certification, for they have no means whereby they can make this determination by themselves. When that certification and the holder's entitlement thereto is called into question, a disciplinary proceeding is the means by which the continued fitness of the holder is determined.

The essentially civil nature of this licensing procedure has long been established, *Ex Parte Wall*, 107 U.S. 265, 288 (1882). To hold, as petitioner contends, that a disciplinary proceeding is in essence a criminal case and requires proof beyond a reasonable doubt, would require the courts to continue to certify to the public, and to require the public as a practical matter to continue to rely upon, attorneys whose conduct has been called into question and against

whom the weight of the evidence demonstrates that there is no justification for such continued certification or reliance. In an era when confidence in the instrumentalities of the administration of justice in general and the integrity of the Bar in particular are more and more called into question such a radical lowering of standards would be intolerable. Moreover, such a holding would inevitably similarly affect any license revocation proceeding, whether it involved an attorney, a barber or a licensed retailer.

To hold that a disciplinary proceeding is a criminal case would lead to further undesirable ramifications. Attorneys who are the subject of complaints could refuse to respond to questions the answers to which might simply subject them to discipline and did not involve criminal conduct in the usual sense. The right of the courts to police their own officers might be totally undermined, because of the requirement of trial by jury in criminal cases.

The Rules of this Court concerning the discipline of its own Bar graphically demonstrates that such result was never contemplated. Thus, where it is shown to this Court that any member of its Bar has been guilty of misconduct, he is forthwith suspended from practice and thereupon offered the opportunity to show good cause why he should not be disbarred (Revised Rule 8). Contrary to the procedure applicable in criminal cases, the "accused" is thereby required to come forward to explain his conduct.

The entire issue of the burden of proof is, moreover, irrelevant here. Even if it is assumed, *arguendo,* that the criminal standard of burden of proof should be applied, the evidence summarized in the statement of the case,

supra, clearly raised issues properly submitted to the fact finder for determination. That evidence, together with the repeated demonstrations in the course of the hearing that petitioner, the only factual witness called in support of his defense, gave false testimony on material points would have warranted the Referee's conclusions that the charge had been established in any forum under any standard of proof.

II.

The Discipline of Disbarment Was Fully Warranted and Was Not Discriminatory.

As the petition and cases cited therein note, the Appellate Division's discretion in the imposition of discipline is significantly guided by the persistence of misconduct, the voluntary nature of restitution if made, the evidence of intent to defraud and the indication, or lack of it, of contrition. It is difficult to conceive a case in which these factors more clearly call for disbarment.

It is conceded that petitioner converted at least $6,500 of the client funds. Only a portion thereof was the complainant's personal property. The balance represented monies held by her in trust for her two infant children pursuant to order of the Surrogate's Court. The conversion began in 1963. It continued until 1968, even after the client, in December 1966, accused petitioner of settling a claim without her knowledge or consent.

The major portion of the sum converted was repaid on December 14, 1966, not voluntarily, but only as a result of a confrontation insisted upon by complainant to which

she felt compelled to bring another attorney retained for that purpose.

The evidence of petitioner's intent to defraud permeates the record. His improper request to counsel for the defendant in the underlying Hitchcock matter to settle without an order of the Surrogate's Court; the forgery of the client's signature to a petition seeking court approval of the settlement; the certification of a falsely conformed copy of the Surrogate's Court order approving the settlement; and the endorsement and conversion of the settlement checks; conclusively demonstrate the intentional nature of petitioner's conduct. It should be noted, incidentally, that the deliberate distortion of the order authorizing the settlement does not appear in the charge because it was discovered after charges had already been made and an amendment at that stage might have raised constitutional issues, *In Re Ruffalo,* 390 U.S. 544 (1968). The evidence was, of course, nevertheless relevant to the charge of settlement of the claim without the client's knowledge or consent.

The record is devoid of any evidence of contrition. In fact, the charge of forgery and settlement without the client's knowledge or consent was denied and petitioner, as the Referee found, repeatedly gave false testimony to support that denial. The conversion of client funds continued from 1963 to 1968, even though petitioner contended that following the December 1966 confrontation he opened a special account to segregate client funds from his own.

In these circumstances, we respectfully submit, there exists a total lack of mitigating circumstances similar to those considered in the cases cited in the petition warranting lesser discipline.

CONCLUSION

The Petition for a Writ of Certiorari Should Be Denied.

Respectfully submitted,

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